(6)

No. 166

Office - Supreme Court, U. S.
FILED
JUL 15 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

GREAT LAKES DREDGE & DOCK COMPANY, A CORPORATION, AND
FITZ SIMONS & CONNELL DREDGE & DOCK COMPANY, A CORPORATION,

Petitioners,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, AS AND CONSTITUTING THE BOARD OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, and RICHARD I. JAMES, as and Constituting the Board of the Department of Treasury of the State of Indiana,
Respondents.

No. ———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Great Lakes Dredge & Dock Company and Fitz Simons & Connell Dredge & Dock Company pray that a writ of certiorari be issued to review the judgment herein of the United States Circuit Court of Appeals for the Seventh Circuit and respectfully show to this Honorable Court:

OPINION BELOW

The opinion of the court below (R. 52-58) is reported in 133 F. (2d) 212.

JURISDICTION

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the District Court's judgment for respondents on January 30, 1943 (R. 58). Petitioners filed a timely petition for rehearing (R. 58-65) which was denied on February 17, 1943 (R. 67). A motion by petitioners to recall the mandate and reconsider the decision was denied on June 2, 1943 (R. 75). An order extending the time for filing a petition for certiorari to and including July 16, 1943, was signed by Mr. Justice Murphy on May 3, 1943 (R. 78). This court has jurisdiction under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347 (a).

QUESTIONS PRESENTED

1. Whether petitioners' receipts or a substantial part thereof were from interstate commerce and whether the imposition thereon of the Indiana gross income tax violated the commerce clause, Article I, Section 8 of the Constitution of the United States.

2. Whether a substantial part of such receipts was from sources outside Indiana, and if so, whether such part was not subject to said tax because of the terms of the act and because of the due process clause of the 14th Amendment to the Constitution of the United States.

3. Whether petitioners' receipts prior to April 1, 1937, the effective date of the 1937 amendment of the taxing act, were in any event taxable at the rate of 1% or whether such receipts were taxable only at the rate of ¼ of 1% as being from the "business of * * * compounding or preparing for * * * use, any article or articles, substance or substances, commodity or commodities."

STATEMENT

This action was brought to recover taxes collected by respondents under the Indiana Gross Income Tax Act both as originally enacted in 1933 (Chap. 50, Indiana Acts 1933, Sec. 64-2601 *et seq.*, Burns' Ind. Stats. 1933), and as amended in 1937 (Chap. 117, Indiana Acts 1937, Sec. 64-2601 *et seq.*, Burns' Ind. Stats. 1933, Pocket Supp.). From an adverse judgment in the District Court (R. 35) petitioners appealed to the Circuit Court of Appeals for the Seventh Circuit, with the result above stated.

During 1933 to 1939, inclusive, the period involved herein with respect to petitioner Great Lakes Dredge & Dock Company, said petitioner was a New Jersey corporation, and during 1935 to 1939, inclusive, the period involved herein with respect to petitioner Fitz Simons & Connell Dredge & Dock Company, said petitioner was an Illinois corporation. Each petitioner had its principal office and place of business in Chicago, Illinois, and was qualified to do business in Indiana (R. 27). Petitioners' receipts consisted of amounts set forth in written contracts for the construction in and about Lake Michigan, within the territorial limits of Indiana, of breakwaters, lighthouses, moor-

ing piles, docks, fills and pile clumps, and all necessary dredging, diving and other work, and the furnishing of materials in connection therewith (R. 32).

All the contracts of petitioner Fitz Simons & Connell Dredge & Dock Company, and most of the contracts of petitioner Great Lakes Dredge & Dock Company, required work under water or under and on land adjacent to navigable water, within Indiana, and the equipment used by them consisted of sand boats, floating derricks, pile dredges, tugs, scows and cranes. All engineers, superintendents, and supervisors had headquarters in Chicago, and the personnel at the construction sites included such persons and licensed seamen, crane operators, tugmen, dredgemen, hoisting engineers, firemen, helpers, divers, steel workers, pile drivermen, carpenters, and laborers, and other workmen, some of whom ate and slept on vessels and others were taken by the petitioners or traveled at petitioners' expense to and from Chicago daily. All payments to petitioners of the amounts specified in the aforesaid contracts were made at petitioners' Chicago offices. The materials which petitioners purchased outside Indiana were transported to the sites of the various projects in Indiana, some of said material having been transported from Chicago by petitioners' own boats (R. 34).

The following is an analysis of the receipts involved herein of petitioner Great Lakes Dredge & Dock Company broken down into the various heads therein described, according to the percentage of each of such items:

Labor costs, including leased machinery	44.4 %
Material purchased by said petitioner outside Indiana	33.30%

Material purchased in Indiana	4.89%
Administrative expense in Chicago	10.58%
Margin for profit or loss, insurance, or miscellaneous	22.61%

(R. 33.)

The following schedule is an analysis of the receipts involved herein of petitioner Fitz Simons & Connell Dredge & Dock Company broken down into the various heads therein described, according to the percentage of each of such items:

Labor costs	26%
Material purchased by said petitioner outside Indiana	13%
Material purchased in Indiana	2%
Machine costs	38%
Engineering and administrative expense in Chicago	9%
Engineering and administrative expense in Indiana	4%

Of the foregoing item of 38% representing machine costs, 12% thereof was for supplies, 24% for repairs, 18% for depreciation, 10% for marine insurance, 25% for fuel and 11% for miscellaneous. (R. 34.)

Petitioners offered to apportion the tax on the basis of activities within and without Indiana, but respondents refused to apportion on any basis. (R. 32-33.)

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court in favor of respondents.

2. The Circuit Court of Appeals for the Seventh Circuit erred in denying petitioners' motion to recall the mandate and reconsider the decision.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 82 L. Ed. 1365, as nearly all the materials were sold interstate, *Wiseman* v. *Gillioz* (Ark.), 96 S. W. (2d) 459, 460-462, and a substantial part of petitioners' other activities were of an interstate character. The tax here is on gross receipts and is unlike that in the *Dravo* case, 302 U. S. 134, 114 F. (2d) 242. There the tax was a privilege tax on account of "business and other activities."

2. The court below misconstrued and misapplied the taxing act. The act did not purport to reach a nonresident's receipts from sources outside Indiana. Sec. 64-2602, Burns' Ind. Stats. 1933 and Pocket Supp. The activities at the construction sites were of course the source of the receipts represented thereby but these were only a part of petitioners' entire activities. A substantial part occurred outside Indiana, which part constituted the source of that portion of petitioners' receipts represented thereby. *Jackling* v. *State Tax Commission* (N. M.), 58 P. (2d) 1167.

3. The decision below conflicts with the decision of the Indiana Supreme Court case of *Oster* v. *Department of Treasury,* 219 Ind. 315, 37 N. E. (2d) 528, and hence with the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 69, 82 L. Ed. 1188.

Sec. 3 (a) of the original act (Chap. 50, Acts of 1933; Sec. 64-2603, Burns' Ind. Stats. 1933) imposed a tax at the rate of ¼ of 1% upon receipts from the "business of * * * compounding or preparing for * * * use, any article or articles, substance or substances, commodity or commodities."

In the *Oster* case the Indiana Supreme Court reversed the lower court's judgment which had been confirmed by the Indiana Appellate Court, 33 N. E. (2d) 799, and rejected the Department of Treasury's contention that performance of a contract not resulting in a sale of goods was subject to the 1% tax rate imposed by section 3 (f) of the 1933 act upon receipts from personal services and performance of contracts. The taxpayer was engaged in manufacturing one of the activities mentioned in section 3 (a) and there were no sales of goods. The petitioners here were engaged in preparing articles or substances for use, another of the activities mentioned in section 3 (a). Hence the lower rate applies even though contracts were performed.

Petitioners submit that the writ should be granted.

Respectfully submitted,

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Petitioners,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, as and Constituting the Board of the Department of Treasury of the State of Indiana,

Respondents.

No. 166

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

No. 166

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The Facts.

Petitioners' statement of the facts is substantially correct. However, petitioners' statement contains certain conclusions of petitioner.

With respect to petitioners' offer to apportion, referred to by petitioners at page 5 of their petition herein, the Record shows the following:

"Said defendant Department of Treasury, by letter dated October 27, 1941, refused to consider any apportionment of the receipt in this matter.

"The Department took the view that the activity of the plaintiff was that of a contractor performing a contract within the State of Indiana and as such did not come within the purview of the commerce clause; that the gross income tax law of Indiana with respect to tax upon gross receipts derived from the performance of contracts within the confines of the State of Indiana, did not, in the opinion of the Department, permit an apportionment of the tax, and such prohibition did not conflict with the due process clause; it concluded that the weight of authority seemed to justify the assumption that the state in which the contract was fulfilled was entitled to use the entire gross receipts from such a source measuring the tax to be imposed upon activities within the taxing state."

(Finding IX, Record, pp. 32-33.)

The Issues.

Petitioners' statement of the issues and questions presented is substantially correct.

Statutes.

Pertinent sections of the Indiana Gross Income Tax Act of 1933, and that Act, as amended, are set out in full in Appendix, *infra,* pp. 18-20.

B.

SUMMARY OF ARGUMENT.

One.

The levy of the tax here does not violate the Commerce Clause.

The State of Indiana is not prohibited by the Commerce Clause of the Federal Constitution from levying the local tax involved herein, measured by the gross receipts of petitioners from the performance of construction contracts within the State of Indiana. (Argument, *infra*, pp. 5-8.)

Two.

The levy of the tax here is not prohibited by the Fourteenth Amendment and is proper under the terms of the state taxing act.

No portion of the transactions taxed occurred outside Indiana. The gross receipts of petitioners from the performance of construction and dredging contracts within Indiana were from purely local sources, and, therefore, the taxes herein were properly paid and collected. (Argument, *infra*, pp. 8-15.)

Three.

The tax at the rate of one per cent. is proper.

Petitioners' receipts prior to April 1, 1937 (under the original Gross Income Tax Act of Indiana, Chapter 50, Acts of 1933, p. 389, Sec. 64-2601 *et seq.*, Burns' Ind. Stat. Ann., 1933 Ed.), properly were taxable at the rate of one per cent. (Argument, *infra*, pp. 15, 16.)

ARGUMENT.

The Nature of the Case.

Petitioners brought this action in the District Court to recover taxes paid by them under the provisions of the Indiana Gross Income Tax Act of 1933 and that Act as amended. *Chap. 50, Acts of 1933; Chap. 117, Acts of 1937: Sec. 64-2601 et seq. Burns' Ind. Stat. Ann. 1933 ed. and Pocket Suppl.*

The District Court referred the case to a Special Master and in due course the Master reported findings of fact and conclusions of law which were adopted by the Court. The conclusions of law were in favor of defendants (respondents) and judgment was rendered accordingly. The Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the District Court, 133 Fed. (2d) 212.

Both petitioners are foreign corporations—Great Lakes Dredge and Dock Company is a New Jersey corporation and Fitz Simons and Connell Dredge and Dock Company is an Illinois corporation—and both were admitted and qualified to do business in Indiana during the tax periods involved herein.

Each petitioner's gross receipts involved in this action came from the performance of contracts for the construction in and about Lake Michigan, within the territorial limits of the State of Indiana, of breakwaters, lighthouses, mooring piles, docks, fills and pile clumps, diving and dredging and other work and the furnishing of materials in connection therewith.

The receipts of each petitioner directly arose from such contracts, which provided that petitioners should furnish

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All emphasis is that of respondents unless otherwise stated.

the materials and perform the work in connection with such projects, in accordance with the specifications of the government or other contracting party.

In all of the government work the materials and workmanship were inspected by government inspectors at the site of the various works and such materials and workmanship were either accepted or rejected in accordance with the contracts.

It is the position of the State that the entire gross receipts of petitioners from their performance of contracts within Indiana are the proper measure of the state tax.

One.

The tax here is not prohibited by the Commerce Clause.

The case of *Adams Manufacturing Company* v. *Storen* (1938), 304 U. S. 307, does not prohibit the application of the Indiana tax measured by petitioners' gross receipts from contracts performed within Indiana. In that case, this same tax was held to be invalid when laid by the State of Indiana upon receipts from sales of goods manufactured in Indiana and sold in other states.

The *Adams* case establishes the principle that the seller's state is prohibited by the Commerce Clause from imposing a tax on the gross receipts from sales of goods in another state. *McGoldrick* v. *Berwind-White Coal Mining Company* (1940), 309 U. S. 33, 57.

It is a proposition of law no longer open to question that the mere formation of a contract between persons in different states does not make the contract a subject of protection of the Commerce Clause, at least in the absence of congressional action, when, as in the case here, the con-

tract is to be completed and performed wholly within the borders of one state. This is true although the contract incidentally may affect interstate trade. *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33; *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 251; *Ware & Leland* v. *Mobile County* (1908), 209 U. S. 405, 409; *Paul* v. *Virginia* (1869), 8 Wall. 168; *Indiana Farmers Guide* v. *Department* (1940), 217 Ind. 627, 29 N. E. (2d) 781, 784.

The Commerce Clause does not in terms prohibit state taxes. *Swift* v. *U. S.* (1905), 196 U. S. 375, 399; *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 254.

State taxes, measured by gross receipts, have been uniformly upheld when there has been no possibility, as here, that the transactions taxed could bear any greater tax burden than transactions having absolutely no extrastate characteristics.[1]

It is the *effect* of a local tax upon commerce in which the Court has been interested and, in the past when the possible effect of a state tax has been to place so-called "interstate" commerce at a disadvantage, competitively, with purely local trade, the mere fact that the tax was conditioned on a local event did not save it. Contrarywise, where the *effect* of the tax has been to place transactions having incidental extrastate elements on an equal basis,

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1 *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *Banker Bros. v. Pennsylvania*, 222 U. S. 210; *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169; *Sonneborn Bros. v. Cureton*, 262 U. S. 506; *Graybar Electric Co. v. Curry*, — Ala. —, 189 So. 186, 308 U. S. 513; *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33; *Department of Treasury v. Allied Mills, Inc.*, — Ind. —, 42 N. E. (2d) 34, aff'd 63 S. Ct. 666. Cf. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435; *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359.

taxwise, with purely local trade, the tax has been sustained. The tax here is valid and withstands all of the tests prescribed by the Court.

Obviously, the tax in this case is "conditioned upon a local event." *Miles* v. *Department of Treasury of Indiana, et al.* (1935), 209 Ind. 172, 199 N. E. 372.[2] *See also:* Sec. 2, Chap. 117, Acts of the General Assembly of Indiana of 1937, p. 611: Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 Ed., Pocket Suppl.; Sec. 2, Chap. 50, Acts of the General Assembly of Indiana of 1933, p. 390: Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 Ed.; *Department of Treasury* v. *Allied Mills, Inc.* (1942), — Ind. —, 42 N. E. (2d) 34, *aff'd* 63 S. Ct. 666; *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 254.

The matter which the statute authorizes as the taxable activity is a thing which occurs in Indiana, either doing business within the state or deriving income from sources within the state.

The Indiana statutes involved herein levy a tax

> "measured by the amount or volume of gross income * * *. Such tax shall be levied * * * upon

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[2] In the *Miles*, case, *supra*, the Supreme Court of Indiana said:

> "We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derive income from sources within the state upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state." (199 N. E. at 379.) Without any question the gross receipts of petitioners from performing these contracts in Indiana were from Indiana sources, and in fulfilling their contracts petitioners were unquestionably transacting business within Indiana.

> the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this State, or who derive gross income from sources within this State, * * *." *Sec. 2, Chap. 50, Acts of 1933, p. 330. Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed.*

The 1937 amendment did not change the nature of the tax. (See Appendix, *infra*, p. 20.)

All of these petitioners' gross receipts were derived from the performance of construction and dredging contracts within Indiana. (Finding VIII, Record, p. 32.) Therefore, petitioners were plainly subject to the Acts because they were engaged in business within the state and derived gross income from Indiana sources (*i. e.*, from the performance of the construction and dredging contracts). The taxes here, levied pursuant to ample state power and not prohibited by any constitutional provision sought to be invoked by petitioners, were properly paid.

Two.

The levy of the taxes here is not prohibited by the Fourteenth Amendment and is proper under the terms of the taxing act.

The fact that materials furnished and used in Indiana by the dredge and dock companies were purchased elsewhere in no way affects their liability for this local tax. *Dravo Contracting Company* v. *James* (1940), 114 Fed. (2d) 242, *cert. den.* 312 U. S. 678.

A good part of the petitioners' receipts were from construction contracts with the United States Government. In

all of the government work the materials and workmanship were inspected at the site of the various works and such materials and workmanship were there accepted or rejected in accordance with the terms of the contract.

All of the work for which petitioners received money (*i. e.*, gross receipts) was performed *in Indiana* and all of the materials which petitioners furnished pursuant to the contracts were furnished at the job sites *in Indiana.*

It seems obvious that the erection of breakwaters, lighthouses and dredging activities are peculiarly local in character. The state's right to impose a tax, measured by the gross receipts therefrom, is not affected by the fact that the contractors acquired some of the materials which they used in Indiana outside the state, or the wholly irrelevant fact that some of the workmen employed by petitioners came to and from Chicago to perform work for petitioners in Indiana in fulfilling their contracts.

To hold that these petitioners are engaged in "interstate" commerce, in effect, would leave the way open for tax evasion by contractors, residents of the state, who may acquire materials manufactured outside Indiana for use in performing similar strictly local contracts. Respondents assert that the protection afforded by the commerce clause does not extend so far as to prohibit state taxation, measured by the gross receipts from purely local activities, simply because the taxpayer incurs certain expenses outside the taxing jurisdiction in some way connected with his local activities. *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

The only authority cited by these petitioners as to the nature of their activities is the case of *Wiseman* v. *Gillioz,*

192 Ark. 850, 96 S. W. (2d) 459, decided in 1936. That case has no application here.

The question under consideration in the *Wiseman* case, an action for injunction to restrain collection of the tax; was whether there "was a transfer to the city for a consideration" as defined in the Arkansas tax statute. (96 S. W. (2d) at 461.)

The Supreme Court of Missouri in *City of St. Louis* v. *Smith,* 342 Mo. 317, 114 S. W. (2d) 1017, expressly declined to follow the *Wiseman* case, and approved *York Heating & Ventilating Company* v. *Flannery,* 87 Pa. Super. 19 where that Court said of the installation of a blower and heating system: "The contract in suit was in no sense a contract of sale. *It was a construction contract.*" Patently, contracts for the construction of lighthouses and breakwaters, and for dredging are not contracts of sale.

The respondents relied principally upon the theory of *James* v. *Dravo Contracting Co.,* 302 U. S. 134, and *Dravo Contracting Co.* v. *James* (1940), 114 Fed. (2d) 242, *cert. den.* 312 U. S. 678. In the latter case the Circuit Court said:

> "* * * The state unquestionably may tax the income of a contractor arising upon construction within the state of the site of construction; and the fact that the materials may have been fabricated in other states, either by the contractor or others, cannot affect the state's power." (114 Fed. (2d) at 246.)

The factual situation in the *Dravo* cases and these cases are strikingly similar:

Dravo	*Great Lakes & Fitz Simons*
1. Non-resident of taxing state.	1. Non-residents of taxing state.
2. Contract with U. S.	2. Government and private contracts.
3. Measure of tax: gross receipts.	3. Measure of tax: gross receipts.
4. Taxing Act: essentially the same as Indiana Act.	4. Taxing Act: essentially the same as West Virginia Act.
5. Expenses: not deductible under Act.	5. Expenses: not deductible under Act.
6. Place of performance of contract: a. In taxing state. b. In navigable waters. c. Work and materials accepted in taxing state.	6. Place of performance of contract: a. In taxing state. b. In navigable waters. c. Work and materials accepted in taxing state.
7. "Gross Income" defined as in Indiana Act.	7. "Gross Income" defined as in West Virginia Act.
8. Contentions of taxpayer: a. Interstate commerce. b. Lack of due process. c. Governmental immunity.	8. Contentions of taxpayers: a. Interstate commerce. b. Lack of due process.
9. Materials obtained outside taxing state, accepted within.	9. Materials obtained outside taxing state, accepted within.
10. Decision: *Taxable.*	10. Decision: *Taxable.*

All of petitioners' gross receipts involved herein came directly from the performance of their contracts in Indiana. The case of *Jackling* v. *State Tax Commission,* 40 N. M. 241, 58 P. (2d) 1167, holds that "source" is

> "A place where something is found or whence it is derived or taken." (58 P. (2d) at 1171.)

Certainly, petitioners' receipts are not "found" or "taken" or "derived" in Illinois—but in Indiana.

And, the fact that physical receipt of gross income may have occurred outside Indiana does not authorize petitioners to avoid this tax. *Department of Treasury of Indiana* v. *Wood Preserving Corp.* (1941), 313 U. S. 62, 67.

The Indiana statute levies "a tax, measured by * * * gross income * * * derived from sources within the State of Indiana of all persons and/or companies * * * who are not residents of the State of Indiana, but are engaged in business within the state, or who derive gross income from sources within this state * * *". Sec. 2, Chap. 50, Acts of 1933, Sec. 64-2602 Burns' Ind. Stat. Ann. 1933 ed. (The 1937 amendment does not change the substance of the tax-levying section of the Act, Appendix, *infra,* p. 20.)

Petitioners have contended that the source of part of their receipts was Illinois. That is not the case—in Illinois petitioners incurred certain expenses or bought materials preparatory to the performance of their contracts in Indiana. And, every cent of income of petitioners involved herein came from the performance, *in Indiana,* of those contracts.

It is well here to examine the various items of expense contained in the findings of the trial court. In Findings

X and XI, Record, pages 33-34, each item contained in the analysis is an *expense* item. In other words, petitioners are seeking to *deduct* expenses from their gross receipts which are the statutory measure of the tax.

The Act specifically states:

> "The term 'gross income' * * * means the gross receipts of the taxpayer * * * without any deductions on account of the return of capital invested, the cost of property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited and without any deductions on account of losses, and without deductions of any kind or character * * *."
>
> Sec. 1 (m), Chap. 117, Acts of 1937, Sec. 64-2601 (m), Burns' Ind. Stat. Ann. 1933 ed., Pocket Suppl. (The original Gross Income Tax Act of 1933 contained substantially the same clause. Appendix, *infra*, p. 19.)

The Indiana tax is a privilege tax, so far as nonresidents such as petitioners are concerned, measured by gross receipts "upon the basis of * * * the privilege of transacting business within the state." *Miles v. Department of Treasury, et al.*, 1935, 209 Ind. 172, 199 N. E. 372, 379.

Here the measure of the tax is the gross receipts from contracts completely performed within Indiana. Under this statute, no deduction from gross receipts is authorized, even if the expenses sought to be deducted from the measure of the tax be incurred within the state.

Petitioners are taxable under the plain terms of the taxing Act. The original Act provides that:

"The term 'gross income' * * * means the gross receipts of the taxpayer received in compensation for personal services and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts from the sale of property, tangible or intangible, real or personal, and service, or any or all of the foregoing * * *".

Sec. 1 (f) Chap. 50, Acts of 1933, Sec. 64-2601 (f), Burns' Ind. Stat. Ann., 1933 ed.

The 1937 amended Act provides:

"The term 'gross income' means the gross receipts of the taxpayer received as compensation for personal services * * * and the gross receipts of the taxpayer received from trades, businesses or commerce * * * all receipts received from the performance of contracts * * *."

Sec. 1 (m), Chap. 117, Acts of 1937, Sec. 64-2601 (m), Burns' Ind. Stat. Ann. 1933 ed., Pocket Suppl.

Both the original and amended statutes provide for taxation of "all funds received from the performance of contracts" at the basic and general statutory rate of one per cent.

Sec. 3 (f), Chap. 50, Acts of 1933, Sec. 64-2603 Burns' Ind. Stat. Ann. 1933 ed.;

Sec. 3 (g), Chap. 117, Acts of 1937, Sec. 64-2603 (g), Burns' Ind. Stat. Ann. 1933 ed., Pocket Suppl.;

Adams Manufacturing Co. v. Storen, et al., 1937, 212 Ind. 343, 7 N. E. (2d) 941.

With respect to these petitioners, the State of Indiana has exerted its power to tax in relation to the protection it has afforded and the opportunities it has provided. The state is free, therefore, to pursue its own properly enacted fiscal policies, unembarrassed by the constitutional limitations herein sought to be invoked by petitioners. *Wisconsin v. J. C. Penney Co.*, 1940, 311 U. S. 435, 444; *Nelson v. Sears, Roebuck & Co.*, 1941, 312 U. S. 359, 364.

Three.

Petitioners were properly taxable at the rate of one per cent.

Petitioners err in supposing that the case of *Oster v. Department of Treasury*, 1941, 219 Ind. 313, 37 N. E. (2d) 528, has any application here. The facts there were that the taxpayer was engaged in fashioning coats and cloaks and other products out of materials which belonged to a Chicago concern, which concern was engaged in the business of selling such finished products. The receipts of the taxpayer were derived from processing of materials which did not belong to him. There was never any transfer of title or ownership of any of the materials, and the work done by Oster was admittedly in the nature of manufacturing.

However, here petitioner is engaged in Indiana in doing certain specified work and furnishing certain specified materials. Their gross incomes were derived directly from the performance of their contracts. Their activities in that regard are not within the ordinary meaning of "manufacturing" and, if there is a sale, there is no question but that the sale is to the ultimate and final consumer, and, as

such, a retail sale under this statute (*Adams Mfg. Co. v. Storen*, 212 Ind. 343, 7 N. E. (2d) 941, reversed on another point: 304 U. S. 307). Such receipts are properly taxable under the Acts at the basic rate of one per cent.

Section 3 (a) of the original Gross Income Tax Act (Chap. 50, Acts of General Assembly of 1933, p. 391) does not apply for petitioner is not engaged in nor does it derive receipts from any business described therein.

The section of the Act relied upon by petitioner has been construed, administratively and judicially, to include only "manufacturing". It has never been construed to include receipts such as are involved herein.[3]

Under the tax statute, one per cent is the general and basic rate. Certain enumerated types of receipts are taxable at a lesser rate. Petitioner comes within no such exception, and is, therefore, properly taxable at the one per cent. rate.

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3 Cf.: *Department of Treasury v. Ridgely*, 1936, 211 Ind. 9, 4 N. E. (2d) 557; *Clark's Laundry & Dry-Cleaning Co. v. Department of Treasury*, 1937, 103 Ind. App. 359, 5 N. E. (2d) 683; *Suabedissen-Wittner Dairy, Inc. v. Department of Treasury*, 1938, 105 Ind. App. 626, 16 N. E. (2d) 964.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

PERTINENT SECTIONS OF THE ORIGINAL GROSS INCOME TAX ACT:

"(f) The term 'gross income,' * * * means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding and accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, * * * without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses. * * *"

Sec. 1 (f), Chap. 50, Acts of General Assembly of 1933.

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupation and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Sec. 2, Chap. 50, Acts of General Assembly of 1933.

"(a) Upon the entire gross income of every person engaged in the business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity or commodities; or in the business of mining and/or producing for sale, profit, or commercial use any oil, natural gas, stone, coal, sand, gravel or other mineral product, or felling and producing timber, for sale, profit or commercial use; or in agriculture, including the production of live stock, poultry, eggs, or any other product of the farm, orchard, garden or greenhouse, one-fourth of one per cent.

Sec. 3 (a), Chap. 50, Acts of General Assembly of 1933.

"(f) Upon the gross income of every person engaged in any business or activity not enumerated in subsections (a) to (e), inclusive, of this section, including, but not in limitation of the foregoing, the gross income from professional services, personal services, sales of real estate, all funds received for the performance of contracts, all funds from the investment of capital, and all receipts from any source whatsoever, one per cent."

Sec. 3 (f), Chap. 50, Acts of General Assembly of 1933.

PERTINENT SECTIONS OF THE AMENDED GROSS INCOME TAX ACT:

"(m) The term 'gross income', * * * means the gross receipts of the taxpayer * * * received from trades, businesses, or commerce, including admission fee or charges, and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets, or from the assignment or sale of rights, all receipts received from the performance of contracts, all receipts received

as prizes and premiums, all receipts received from insurance, all amounts received as alimony, damages, or judgments, and all receipts received by reason of the investment of capital, * * * without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character * * *"

Sec. 1 (m), Chap. 117, Acts of General Assembly of 1937.

"Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other sources within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Sec. 2, Chap. 117, Acts of General Assembly of 1937.